ORIGINAL

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

Docket No. 70-45

Pages 1 thru 56

Washington D.C.
October 18, 1971

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Washington, D. C.,

Monday, October 18, 1971.

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C., for the Appellant.

NORMAN P. RAMSEY, ESQ., 10 Light Street, 17th floor, Baltimore, Maryland 21202, for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 45, the United States against Brewster.

Excuse me, Mr. Solicitor General, the orders have been duly filed and certified, as you know, and will not otherwise be announced.

Mr. Solicitor General, you may proceed.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court:

This is a direct appeal from a decision of the United States District Court for the District of Columbia, which has held that an Act of Congress, generally applicable throughout the United States, is unconstitutional as applied to the offense charged in the criminal indictment before it.

The offense, to put it simply, is bribery; and the defendant against whom the charge is made was a United States Senator at the time charged, is now a former United States Senator.

The facts are simple. There is virtually nothing before the Court except the indictment found by the Grand Jury, and a motion to dismiss the indictment, which was granted.

The indictment contains a number of counts. The odd-

numbered counts relate to the defendant, the alleged bribee. The even-numbered counts relate to the parties who are charged with having offered or given the bribes, the bribers.

And the underlying facts appear on page 1 of the Appendix, as alleged in the indictment, that at all times Daniel Brewster was a public official of the United States, a member of the Senate of the United States from the State of Maryland.

Then the gist of the charge appears on page 2 of the Appendix with respect to count 1 -- and I repeat, the odd-numbered counts relate to Senator Brewster and are all essentially the same, as far as the issue now before the Court is concerned. And the charge is that he corruptly asked, solicited, sought, accepted, received, and agreed to receive the sum of $5,000 for himself and foreign entity, that is the D. C. Committee for Maryland Education, from Cyrus T. Anderson and Spiegel, Inc., in return for being influenced in his performance of official acts in respect of his action, vote, and decision on postage rate legislation, which might at any time be pending before him in his official capacity.

Now, the motion which was filed on behalf of the defendant appears on page 8 of the Appendix. There is also another motion on page 9 which relates to vagueness and things of that sort, which was not dealt with in any way by the District Court, and an appeal under the Criminal Appeals Act

brings to this Court only the issue which was dealt with -- excuse me, this is not the Criminal Appeals Act, this is the Act allowing direct appeals in cases where an Act of Congress has been held unconstitutional. And such an appeal brings here only the issue which was decided below.

The motion to dismiss, on page 8 of the Appendix, the defendant moves to dismiss the odd-numbered counts, and the ground is that counts 1, 3, 5, and 7 of the indictment charge this defendant with violations of 18 U.S.C. 201(c)(1), and in each such count this defendant is charged with being influenced in his performance of official acts in his capacity as a United States Senator.

And there is, of course, not the slightest doubt that that is what the indictment charges: that he was influenced in his official act in his capacity as a United States Senator.

Now, on the question of jurisdiction of this Court: was postponed until the hearing on the merits, and here I find I have made a mistake. This is an appeal under the Criminal Appeals Act. It might possibly have been brought under the other statute, but it is an appeal under the Criminal Appeals Act. The statute involved is the former form of Section 3731 of Title 18, known as the Criminal Appeals Act.

The amendment to this provision, which was enacted last January, is not applicable, since the case was begun by

indictment on December 1, 1969, more than a year before the enactment of the amendment.

The relevant provisions of the Criminal Appeals Act are quoted on page 5 of the Appellee's Motion to Dismiss or Affirm, and on page 9 of the Appellee's Brief, and to refresh the Court's recollection I will read the two provisions involved, which are, at least verbally, relatively simple.

Appeal lies to this Court under that statute:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded."

And the other statute relating to appeals on acts, decisions holding Acts of Congress unconstitutional, is not applicable, because it applies only to civil cases, and this is a criminal case.

And the second head of jurisdiction, under the old Criminal Appeals Act, is:

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

And we contend that there is jurisdiction under this case under either or both of those two provisions of the former Criminal Appeals Act.

In the first place, it's entirely clear that the

defendant has not been put in jeopardy. No jury was empaneled, nor was the case in any way submitted to the judge as a trier of the facts, with the judge sitting in place of a jury.

There was simply the indictment and a motion to dismiss. The traditional way to raise a legal question with respect to a criminal indictment. And thus the case comes within the language of Justice Harlan in the Sisson case, where, in distinguishing this Court's decision in United States v. Covington, Justice Harlan noted that the dismissal in Covington was "before trial, without any evidentiary hearing." And that is printed in italics in the report itself.

That, of course, is exactly the situation here. This was before trial and without any evidentiary hearing.

And, similarly, the situation comes clearly within the language used in the Court's opinion in the Jorn case last term, where it was said that in enacting the Criminal Appeals Act, Congress wished "to avoid subjecting the defendant to a second trial where the first trial had terminated in a manner favorable to the defendant, either because of a jury verdict or because of judicial action."

Here there has never been a first trial. There has been a motion to dismiss, entirely on the face of the pleadings. There has been a decision on that motion to dismiss, but that is not in the sense of the Criminal Appeals Act, or of the sense of double jeopardy, a trial.

In this case there was no stipulation of facts of any sort. There was nothing that could even be regarded as a bill of particulars or anything like that. There were no concessions by the government of any sort, nor any factual assertions by the government beyond what is stated in the indictment.

The entire proceedings before Judge Hart are printed in the Appendix. I believe that what I have said with respect to them is fully supported by the record.

There is nothing in it to support a contention that Judge Hart made any sort of a factual determination or adjudication. What he decided is that on the facts alleged in the indictment the statute cannot be constitutionally applied.

Mr. Ramsey quite properly points to language which was used by Judge Hart in expressing his opinion, and this appears on page 33 of the Appendix, and Judge Hart did say, right at the middle of the page: "Gentlemen, based on the facts of this case" -- which sounds bad from my point of view -- "it is admitted by the government" -- which sounds bad from my point of view -- "that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with performance of a legislative function by a Senator of the United States."

From an examination of the transcript, it is readily apparent that the facts to which Judge Hart was referring were those stated in the indictment, not anything that was

conceded by the government or asserted by the government or offered by way of affidavit, deposition, in any other way in terms of facts above and beyond the facts alleged in the indictment, and it is also clear that nothing was admitted in a factual sense by counsel for the government before Judge Hart.

Insofar as counsel admitted anything there, it was that the facts charged in the indictment are those which are there alleged; namely, that the defendant was at all relevant times a United States Senator, and that he is charged with seeking and receiving a bribe under the circumstances as stated in the indictment.

Thus there is clearly a case in which the court below has held that an Act of Congress is unconstitutional as applied to the facts alleged in this indictment. And this seems to come squarely within this Court's decision in the Knox case, in 396 U.S., which upheld the jurisdiction of this Court under the Criminal Appeals Act, where the statute had been held unconstitutional as applied to the facts alleged in the indictment, although not generally unconstitutional.

It is also our view that there is jurisdiction under the other clause of Section 3731, the one relating to a motion in bar. Now, we contend that the assertion made in the motion to dismiss in this case, namely, that this defendant is charged with being influenced in his performance of official acts in

his capacity as a United States Senator, and that the indictment for this reason violates the provision of Article I, Section 6 of the United States Constitution, is a motion in bar.

Sometimes a motion in bar is referred to as a confession and avoidance. And Mr. Ramsey has said that the defendant has not confessed. I think, though, that the problem comes from too broad a use of the word "confession". When a person raises the statute of limitations, or a pardon, this is clearly within the motion in bar provision. Yet in such a case the defendant need not confess, he says, in effect, "whether I did it or not, or even if I did do it, you cannot prosecute me because of the statute of limitations, or of the pardon, as the case may be.

And this is exactly what Senator Brewster's counsel has said here: "whether I did it or not, or even if I did do it, you cannot prosecute me because of the speech or debate clause." This seems to me to be what is meant by motion in bar, as used in this statute, or by the term "special plea in bar", which was used in its original form.

It is, for example, the kind of motion that would have been made by a Member of the House of Commons in the 18th Century if there were a charge against him which he alleged came within parliamentary privilege.

What the defendant is saying is that "even if I admitted all of the facts, I have a special defense"; that, I

suggest, is a motion in bar and brings this case within the jurisdictional statute.

Now, let me turn to the merits of the case, which is, of course, a natural sequel to the Court's decision in the Johnson case, in 383 U.S., decided a little over five years ago.

Understandably enough, the appellee relies on the Johnson decision, and it is incumbent on me to show that the facts there make that case distinguishable from those which are alleged in this indictment. And I repeat, we have nothing here except the facts alleged in the indictment. It is perfectly possible, it seems to me, for this trial to be conducted under this indictment in a way which might infringe the Johnson case, and if that were done there would be another issue.

But that isn't the problem here. The problem here is whether the trial can be conducted in such a way as not to infringe the Johnson case, and I submit that it can.

Q The Johnson case came here after a conviction, didn't it?

MR. GRISWOLD: The Johnson case came here after a verdict of guilty by a jury in a full trial.

Q And a full transcript of the evidence?

MR. GRISWOLD: A full transcript of the evidence. Reversal by the Court of Appeals, and that reversal was upheld

by this Court.

And, indeed, with the benefit of hindsight, it seems apparent that the Johnson case was an unfortunate one to bring here, from the government's point of view.

In the first place, the charge there, the issue there related to a charge under the conspiracy statute, which is, I suppose, the most general of all criminal statutes, the one most subject to undue extension by wide-ranging prosecutors.

In the second place, the prosecution of Congressman Johnson largely turned on a speech which he had made on the Floor of Congress -- that is, the prosecution with respect to this; there was also another count about conflict of interest, which related to his appearances in the Department of Justice. But the conspiracy charge related to a speech he had made on the Floor of Congress relating to building and loan associations. Although the record was a long one and had many things in it, 50 pages of the transcript related to the speech in the case presented by the government. And there was much more about the speech in the presentation of the defense.

The government indeed introduced a copy of the speech in evidence. The conspiracy charge was that the speech was not made for any legislative purpose, but was made by Congressman Johnson for a fee in order that it might be reprinted and distributed to prospective depositors, so as to encourage them to make deposits in Maryland savings and loan

associations.

It is also relevant, I think, that the indictment contained a substantial allegation about the speech, and this was reproduced, in this Court's opinion at page 184, paragraph 15; I read from the opinion:

"It was a part of said conspiracy that the said Thomas F. Johnson should render services for compensation, to wit: the making of the speech defending the operations of Maryland's independent savings and loan associations, the financial stability and solvency thereof, and the reliability and integrity of the commercial insurance on investments made by said independent savings and loan associations on the Floor of the House of Representatives."

Thus, that was a central part of the actual charge in that case.

It should be observed, too, that the Court's opinion is narrowly guarded, on page 184 of the opinion Justice Harlan said, near the top of the page: "Whatever room the Constitution may allow for such factors in the context of a different kind of prosecution", and here we clearly have a different kind of prosecution.

And then on page 185 Justice Harlan said, "We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us," which involved extensive utilization as a central factor in the

prosecution of the making of a speech.

And the Court said, "we expressly leave open for consideration, when the case arises, a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded on a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its Members."

Q Are you suggesting, Mr. Solicitor General, that if the form of statute we have here had been the form of statute involved in the Johnson case the result might have been the other way around?

MR. GRISWOLD: Mr. Justice Brennan, I think very likely not, because of the extensive use of the speech. It's a little hard for me to answer it, because the very fact that it was a conspiracy charge, and that you then had to allege extensive activities to support the conspiracy, is part of what brought up the problem. And I would agree that if this case went to trial and we ended up with a record like that in the Johnson case, that we might well have a very serious problem. And it will not be my responsibility to try the case --

Q Suppose we had had a provision of this very statute that we're dealing with now, another section, which had said it was a criminal offense to accept a bribe for making a speech on the Floor of the House. Suppose that were the precise section that we dealt with.

MR. GRISWOLD: Mr. Justice, I would be prepared to defend that under the Johnson decision, it is a more difficult case than we have here, though not a great deal more difficult because this one refers to vote.

Q And the government seems to equate speaking and voting in terms of the reach of the clause.

MR. GRISWOLD: No, Mr. Justice, I think the Court has at times equated speeches --

Q Yes, but you make no argument that the speech and debate clause does not reach voting.

MR. GRISWOLD: Mr. Justice, I --

Q You seem to concede it.

MR. GRISWOLD: -- am not quite willing to accept that in all its impact. After all, the speech and debate clause refers only to speech and debate. And --

Q So you're just not arguing it here?

MR. GRISWOLD: I'm just not arguing it. I recognize that it's very closely related, but some of the talk, to the effect that some of the references in the opinions, to the effect that it applies to votes as well, seems to me to be an example of that well-known circumstance that we are always dealing with, of the tendency of principals to expand themselves to the limit of their logic. And all that I need say here is that the Johnson case, involving extensive use of the speech, which is precisely what the Constitution refers to,

speech or debate.

For example, there are other extensions of the speech or debate clause made so far in Mr. Ramsey's brief that it applies to any activity conducted by a Senator or a Congressman in connection with his legislative work. And I think that is far too extensive.

Now, I agree that the line between vote and speech is pretty small, but the Constitution refers only to speech. And I think that language in the opinion in the Johnson case, to which I have just referred, indicates that if there is reference to a vote but it is incidental, tangential, is not the essence of the charge that the constitutional provision does not make it impossible for Congress to allocate the determination of the factual matters involved with respect to bribery of a Congressman or Senator to the courts.

Q Does the conjunction of the terms "speech and debate" in the Constitution indicate that it is speeches in the Congress on the Floor and debates in the Congress on the Floor that is being talked about, or is it broader than that?

MR. GRISWOLD: Mr. Chief Justice, it is speech or debate, rather than speech and debate.

Q Speech or debate, yes.

MR. GRISWOLD: I don't think that, in this context, makes any difference. I would suppose that if they had wanted to say vote, they -- it might have occurred to somebody, for

any "speech, debate or vote" in either House. Vote is expressly left out.

If the Court feels that the speech or debate clause makes it impossible for Congress to make it a crime for a Congressman to accept a bribe, then this appeal must fail. I do not think that the Johnson case decided that. I do not think that the speech or debate clause requires that conclusion. I think that the Johnson case itself expressly left this question open, and indicated that under a properly drawn statute the mere fact that there was some reference to a vote was not fatal.

Q Well, may I be clear about this, Mr. Solicitor: you are not, however, contending that the speech and debate clause protects only speech, are you?

MR. GRISWOLD: I'm walking right up to that, Mr. Justice. I agree that the Court has said, several times, in somewhat sweeping ways, that it goes beyond speech or debate. However, as I read the Constitution, what the Constitution says is speech or debate; and I still find some difficulty in seeing how it is appropriate to construe it to apply to other things than speech or debate, and I know of no case where the Court has so decided.

Q Well, what's troubling me, of course, is what's in your footnote at the bottom of page 11, where you say, "Whatever the precise limits of Johnson, we do not contend" --

MR. GRISWOLD: Well --

Q -- "that the clause protects only speech."

MR. GRISWOLD: -- I recall that, and it is there, and I am not contending that it is limited to speech or to -- literally to speech; I am perfectly aware of the fact that words have to be construed in a broader significance. But what I am trying to maintain is that the mere fact that there is a reference in this indictment to a vote does not mean that the statute is unconstitutional as applied to this, the charge in this indictment; and I am suggesting that the Court has never so decided.

Q Would you think that speech or debate reached speaking and utterance in a committee hearing?

MR. GRISWOLD: Well, I would think not, myself. But -- well, let me modify that. I think, of course, that a Congressman or Senator should be protected against suits for libel from things said in committee hearing. But the constitutional provision is for any speech or debate in either house.

We don't have that issue here. I repeat, I think that some of the language in some of the cases has been very broad, and that there are no decisions on such matters, even with respect to what is said in committee hearings. But it is not -- there is nothing about a committee hearing in this case; it's not necessary to decide that.

I'd like, in the brief time remaining, to refer to the legislative history of this statute, because, as it now stands, it is in somewhat broad language. This is the statute which is quoted on pages 2 and 3 of our brief. It refers to public official who does these things, and then public official is defined to include a Member of Congress.

This is not brought out in our brief, and I would like an opportunity, very briefly, to present it:

The history of the statutory provision is that in 1853 Congress enacted a statute which was specifically applicable to Members of Congress who take bribes, and who take bribes with intent to influence his vote or decision on any question. From 1853 on, Congress has specifically provided that it was a crime for a Congressman or Senator to take a bribe intended to influence his vote.

That was continued in the Revised Statutes of 1874, and 1878. It was continued in the Criminal Code of 1908. And it was in effect in 1962, when Congress passed the present statute.

But it is entirely clear that in enacting the present statute the motivation to consolidate a lot of separate bribery provisions dealing with public officials generally came from Congress and not from the Executive. There was a report by a staff of subcommittee No. 5 of the Committee on Judiciary of the House of Representatives in 1958,

which recommended the consolidation of these provisions. At page 71 of that report: It is recommended that the provisions prohibiting the bribery of federal employees, Members of Congress, and judges and judicial officers, including jurors, be combined in a single section.

And then that is carried forward in the Committee Reports, Senate Report No. 2213 in the 87th Congress, "The current bribery laws consist of separate sections applicable to various categories of persons, government employees, Members of Congress, judges, and others. Section 201 would bring all these categories within the purview of one section, and make uniform the prescribed act of bribery as well as the intent or purpose involved."

And there is a similar provision in the House Committee Report, which is House Report No. 748 in the 87th Congress.

Now, there was at that time, as you may recall, a considerable development of thought about conflict of interest, a bill with respect to conflict of interest came before Congress, and it was at the initiative of the Senate Judiciary -- of the House Judiciary Committee that these provisions with respect to bribery were consolidated and introduced in the same bill.

And I think it is perfectly fair to say that this statute should be construed in the light of its clear and long-

continued history as one which, in part at least, is focused by Congress on the actions of Congressmen and Senators, and amounts to a clear declaration by Congress that this sort of conduct should be tried in the courts with the procedural safeguards and provisions which are applicable to criminal prosecutions before the judiciary.

Q When was this statute, in its present form, enacted? I didn't --

MR. GRISWOLD: In 1962.

Q 1962?

MR. GRISWOLD: It was 1958 that the House Committee recommended that they be consolidated. When the conflict of interest statute came along, that was put in as a part of it, and it was in 1962 that all the various bribery provisions were brought together into a single statute, which looks quite broad as it is now, but which, in the light of its historical background, is, it seems to me, quite narrowly focused in this application on bribery of Congressmen and Senators.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

[Announcement off the record.]

MR. CHIEF JUSTICE BURGER: Mr. Ramsey, we'll enlarge your time five minutes, which will give the Solicitor General a few moments, a few minutes' rebuttal time.

MR. RAMSEY: Perfectly agreeable.

MR. CHIEF JUSTICE BURGER: You have 35 minutes.

ORAL ARGUMENT OF NORMAN P. RAMSEY, ESQ.,

ON BEHALF OF THE APPELLEE

MR. RAMSEY: Mr. Chief Justice, and may it please the Court:

I'd like to address myself first, if I may, to what I believe is a misconception on the part of the Solicitor -- Mr. Solicitor General as respects the factual background of this case, which was before Judge Hart, at the time he decided the issue, which brings the case here.

At page 12 of the Appendix there appears colloquy between counsel and the court, and I am quoting from my own remarks to Judge Hart, if the Court please.

I made this statement at the foot of page 12 and the top of page 13:

"Now, in this regard the papers which have been filed in the case and the data which has been supplied as respects the claims made against the Defendant Brewster make it perfectly clear that what is being attacked by this indictment are Senator Brewster's votes in committee and his votes on the floor and his activities in connection with what the Supreme Court has described as things generally done in a session of the House by its members."

The Assistant United States Attorney who was arguing the case came back to this point at page 28 of the Appendix,

in colloquy again with Judge Hart.

"Judge Hart:" -- and I am breaking into the middle of the court's question, at about midway down page 28 of the Appendix, if the Court please -- "Well, tell me this: does the indictment in any wise allege that Brewster did anything not related to his purely legislative functions?

"Mr. Baron: We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that."

Now, this is against the background, if the Court please, of there having been supplied, on a confidential basis to the court, a memorandum of fact which replaced a statement in connection with a motion for particulars, which outlined the vexy acts which were addressed to the particular count. And what the Assistant was telling Judge Hart was: Your Honor, we do not contend there were any activites not legislative in nature.

And that is fully supported in the record in this case.

Q Is this an argument, Mr. Ramsey, that this was really a summary judgment, not dismissal of --

MR. RAMSEY: That is correct, sir. We say --

Q Well, where is that memorandum? It's not part

of the record before us.

MR. RAMSEY: It is --

Q I've never seen it or heard it.

MR. RAMSEY: It is a confidential memorandum in the record. I simply put it in context, Mr. Justice Brennan, --

Q Well -- but how are we to treat it as summary judgment? We don't have the bases upon which you make that argument.

MR. RAMSEY: I would say, Mr. Justice, that our approach to that is that the Assistant did make a concession of fact. That is to say that it was a stipulation which was made by the Assistant as respects what the facts of the case were, put before the district judge, and the district judge was entitled to rely upon that as negating the need for additional proof in this particular record. Although the confidential memo does exist in the records of the District Court.

But he saw no need to, in effect, say: we will put on the record the full confidential memorandum, which has been heretofore filed. And, obviously, what was the concern of counsel and the court at that point in time was that this case was approaching trial. We were in the antecedent stages of coming to trial. And there was plenty of publicity, as it was. There was no need to have further newspaper publicity over what might be called the detailed particulars of the

count.

But Judge Hart didn't need to put it on the record, where the Assistant said flatly, on behalf of the United States, --

Q Mr. Ramsey, did he give a stipulation or did he adhere to the interpretation of what the indictment said?

MR. RAMSEY: Mr. Justice, the approach was that the government supplied a memorandum of alleged --

Q So far as I'm concerned, it's a memorandum that isn't in this record; I am not interested in it. At least for this question.

MR. RAMSEY: Well, all I -- the only answer I can give to that, Mr. Justice Marshall, is --

Q He didn't detail that in his statement, did he?

MR. RAMSEY: That is the essence of the memorandum, that nothing except legislative acts are concerned, sir.

Q The point is that he did not mention the memorandum, did he?

MR. RAMSEY: He did not mention the memorandum, no, sir.

Q Wasn't he merely stating what his opinion was of what was in the indictment?

MR. RAMSEY: No, Your Honor, I must disagree with that. What he was saying was what the record in fact disclosed, that is to say, --

Q Well, what record?

MR. RAMSEY: The record which the Assistant knew about, the court knew about --

Q In this record?

MR. RAMSEY: The record in the case before Judge Hart, sir.

Q Is it here?

MR. RAMSEY: It is not, except in the form of the concession by the Assistant.

Q Well, the judge, Judge Hart, in the first paragraph of his opinion, speaks of the facts of this case.

MR. RAMSEY: Yes, Mr. Justice. And it was on that basis that I was trying to put in context all that was said before the court was that the court was relying on facts which he knew to be concessions in the record by the United States, openly conceded by the Assistant, that he was testing legislative acts, pure and simple.

Q Well, Mr. Ramsey, I'm looking at page 2 of the Appendix, the indictment, just above the middle of the page. The indictment charges "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity". Now, --

MR. RAMSEY: Yes, Your Honor.

Q -- how would any details of this so-called bill

of particulars be basically different from that, except to pinpoint the particular day or hour or what-not?

MR. RAMSEY: That's precisely the way in which the particulars -- the particulars simply address themselves to the allegation of the indictment which was that it was official action. That is to say, legislative action. And that is precisely what it did: on a given day, at a given time, in a given committee hearing, in a given vote on the Floor, there was a certain step taken by the Senator which is alleged to show that his action, vote, and decision was,inferrentially at least, premised upon antecedent conduct or relations with Spiegel and/or Anderson.

Q I have difficulty seeing how the hour or the day actually enlarges what is already said in the indictment, so far as the constitutional provision is concerned, --

MR. RAMSEY: Well, I --

Q -- or the jurisdiction of the Court.

MR. RAMSEY: Well, I think, Mr. Chief Justice, that so far as the jurisdiction and so far as the constitutional point are concerned, it can be addressed purely on the basis of the structure of the indictment.

I believe, however, in fairness to the Court, that all of these items which appear throughout this record, in which the Solicitor General had not caught the items in their context, do clearly indicate that the government never con-

tended it was anything but legislative action, which was under attack here. Therefore, we are not up against a miasma of claims that he may have acted with the Executive, for example, in the Burton type situation, where a U. S. Senator -- or a Johnson type substantive counts, where a Congressman works into the Executive side of the government and may indeed be subjected to criminal prosecution, as was Congressman Johnson, in connection with his activities before the Attorney General of the United States, on the Executive side.

Now, this is the position which we have taken right along. That is to say, that basically you may approach the entirety of the problem, both as a constitutional matter and as a jurisdictional matter, on the basis of the indictment before the Court and our motion to dismiss. Because we view our motion to dismiss, if the Court please, in this posture: under the earlier teachings of the Court, in the cases which have dealt with the speech or debate clause, as it has come before this Court, it has taken on a significance which is to the effect that not only does the clause give protection to the accused Senator or Congressman from the accusation itself, but frees him, indeed, from the obligation to defend himself.

This, of course, Mr. Chief Justice, you will recall, was an aspect of the Powell case in the lower court opinion, the Circuit Court opinion, written while you were on the bench here in D. C., and it also was the teaching of the Dombrowski

case, and ultimately of the Powell case before this Court, when it came up here. That there was freedom not only from the charge itself, but, in addition, it was intended to free the particular public servant of the obligation of defending himself, which is an even more subtle concept in the sense that it doesn't quite come to the same form of immunity that we normally think of. It steps in ahead.

And what we had done, by our motion to dismiss in this case, was invite the District Court's attention to the operative events which led to our being in a position where we could say to the court: We ought to be protected against the obligation even to defend ourselves, because --

Q Defend himself from what?

MR. RAMSEY: Defend himself from that -- the liability, Mr. Justice, it speaks in terms of being questioned in any other place, on speech or debate --

Q On any speech or debate?

MR. RAMSEY: That is correct.

Q Now, let's assume that the defendant in this case never made a speech, never engaged in debate, never cast a vote, in committee or on the Floor; but, nonetheless, took a bribe in return for his promise to do one of those things. But either he never got around to it, or he broke his promise. Then what would the posture of the case be?

MR. RAMSEY: I think, Mr. Justice Stewart, the

problem we're up against there is whether this -- his motivation may be questioned. That is to say, --

Q What was the bribe?

MR. RAMSEY: -- what was his motive in accepting the money, is really what you're asking me, sir.

Q Yes.

MR. RAMSEY: And to that extent, you see, you go to motivation, in the Kilbourn case and all of the other cases have addressed themselves not only to acts and conduct, but anything which inquires into motive for the vote.

Q Well, in my hypothetical case there was no vote. He took a bribe in return for his promise to vote in a certain way, or make a certain speech, but either he broke his promise or else he never got around to it, before he was indicted. Then what role, if any, would the speech or debate clause have in that?

MR. RAMSEY: It seems to me that the speech or debate clause would again keep him from being questioned in any other place other than the House, of which he was a member. We do not contend that the Senator or Congressman goes scot-free.

Q Questioned for what in any other place? He's now just simply being charged with taking a bribe.

MR. RAMSEY: But in order to prove the bribe up --

Q And he's never done anything in the House or in the Senate --

MR. RAMSEY: That's correct.

Q -- in response to the bribe?

MR. RAMSEY: Yes, Your Honor.

If I may address myself to the point, Mr. Justice, the way I see it, the situation is this: At the time he accepted the money, in order to prove up the bribery case, it would be necessary to prove that he undertook to do a certain thing. That is to say, that he was to be motivated in connection with official conduct. Otherwise you have proven no bribe.

It is precisely that which the constitutional clause would interdict, and stop the inquiry into.

Q It doesn't say so, does it? Counsel doesn't say so.

MR. RAMSEY: Well, I think, sir, that constitutional clauses, taken on the gloss of the cases which have interpreted it all the way down, --

Q Well, what case interprets it in a way to support your answer to my question?

MR. RAMSEY: It seems to me that the Kilbourn case does, sir, in connection with motive, inquiry into motive, in any place other than the House of which he is a member.

Q Inquiry into what? Making a speech, a debate, or a vote? Here, under my question, there was no speech, there was no debate, there was no vote; there was merely the taking

of a bribe.

MR. RAMSEY: I understand the proposition which the Court puts to me, but I trust it is not thought to be this situation, sir, because this was alleged to be for a vote for various conduct.

Q Well, this was given in turn for a promise to vote a certain way.

MR. RAMSEY: Well --

Q Is there an allegation that there was any such vote?

MR. RAMSEY: Yes, sir.

Q In the indictment?

MR. RAMSEY: Yes, sir.

Q In all of the counts?

MR. RAMSEY: One -- well, the initial counts, the first counts all deal with pending or to be pending before him; the last count, sir, goes to 201(g), which has to do with past conduct as distinct from anticipatory conduct. So he is alleged to have received, in connection with his vote and his action and his official conduct in connection with either anticipated or coming legislation, legislation pending in the Congress; and, in the last count, with legislation which had been in an earlier Congress, sir.

Q It seems to me that at least some of the counts of this indictment pretty well fit under my hypothetical

case.

MR. RAMSEY: Well, this is why I say to the Court that the concession by the Assistant that what is talked about is vote, and what is talked about is legislative conduct, pure and simple --

Q What is talked about in the indictment is taking a bribe, isn't it?

MR. RAMSEY: That is correct. In return for being influenced and in respect to his action, vote, and decision.

Q Mr. Ramsey, --

MR. RAMSEY: Yes, Mr. Chief Justice.

Q -- would your answer or your position be essentially the same if the bribe had been given to a Member for the explicit promise not to vote and not to make a speech? That is, suppose he were an opponent of the legislation, and the money were paid for the negative instead of the positive?

MR. RAMSEY: To stay away and abstain from --

Q To stay away, to absent himself.

MR. RAMSEY: I would think that in that instance, again you would be inquiring into the motive of a legislator, and I believe, sir, that the speech or debate clause would protect against inquiry.

Now, as I said --

Q Now, if he stayed away, inquiry into his staying away.

MR. RAMSEY: That's correct, sir. That's absolutely correct.

Q Right.

MR. RAMSEY: But one has got -- one is the necessary quontum of proof, in order to prove up the other. As the Court pointed out in the Johnson case, Mr. Justice Stewart, you've got a number of aspects in this speech or debate clause. One of them may be the exclusion of evidence at the trial, for example; because if this case had gone to trial and testimony had been elicited or sought to be elicited which had to do with motive for his acceptance of particular moneys, immediately you would have had confronting the court the problem of to what extent is an evidentiary matter, assuming that we don't meet it as a jurisdictional matter. This problem was raised also in the Powell case.

Does speech or debate address itself to jurisdiction of the court? In one phase of our brief we have suggested that it does, in the sense that this is a power delegated constitutionally to one branch of government, and should not be intruded upon by another.

In another portion of the brief we have suggested that the Congress jointly cannot do what the Constitution gives to each of the houses, respectively, the power to punish its own members.

So that there still is, in the background of this

problem, the question of: Is it jurisdictional?

Now, if it is not jurisdictional, and we do suggest at one point that it may be, it certainly, under the Johnson case and I think under any rule of reason, it has its application in the problems of admissibility of evidence at trial, where you run into constitutional interdiction, if you try to elicit the Johnson type testimony. Did you vote? Why did you?

Q Mr. Ramsey, --

MR. RAMSEY: Yes, sir?

Q -- suppose a Senator or a Congressman accepts $5,000 from A to speak and vote on future legislation, another $5,000 from B to speak against and vote against a piece of legislation, and goes fishing.

[Laughter.]

Is he up for bribery?

MR. RAMSEY: I would certainly say, sir, that both of those actions of his would be subject to discipline in his house. I am simply addressing myself in this instance to saying that they should not be questioned in any other place. Which is what the speech and debate says --

Q What would he be disciplined in the house for, for going fishing?

MR. RAMSEY: For improper conduct -- no, for improper conduct in connection with holding out that he would be willing to be influenced in his vote.

It's the old, I hope, the impossible story is -- [laughing] -- equality applies both ways, and he ought to get a fair result.

The fishing aspect of it, I don't think would be a subject of discipline, Mr. Justice Marshall.

Coming to the --

Q As I understand you, Mr. Ramsey, your position is that the speech and debate clause goes so far as to include "except in the house in which he is a member". Any kind of discipline against a Senator or a Congressman, where one official -- what he has done is in connection with his function as a Senator or a Congressman. Do you go that far?

MR. RAMSEY: I do, sir. If it's legislative. As Mr. Chief Justice characterized it here, as legislative conduct; yes, sir, I do.

Q That's what, when I said let's connect it with is official responsibility, I meant.

MR. RAMSEY: Yes, sir; I do.

Q Now -- and you say that the only discipline to which he may be subject is any that may be imposed by his own house; which would take what form?

MR. RAMSEY: It could take the form, as it has in the past illustrations which are found throughout the various studies of the Congress, it can be expulsion, for example, suspension from the house, even imprisonment, and discipline

by fine, may be imposed within the framework of the House of Congress' ability to discipline their own members.

Q But what the House or Senate might do, in disciplining a member, --

MR. RAMSEY: Yes, sir.

Q -- is nothing that the Congress may say shall be turned over to the courts to do for them?

MR. RAMSEY: That is one portion of our brief, Mr. Justice Brennan. We address ourself to that and suggest that where the Congress allocates it to each house, that it is not delegated to the Congress as a whole for the purpose of legislating concerning it.

Now, I think, sir, we have eliminated or omitted only one, and that is a major thing to a politician, and that is the people at the polls. They have the absolute right to turn him out, and this, of course, is one of the political realities of the whole situation, which ultimately must be faced by everybody who must run for office; and it is one of the real justifications for giving a political judgment as respects proper punishment to a political forum as distinct from a judicial forum.

It permits the testate of the conduct of the members. As the Solicitor General argues, he says get it out of the political forum, put it into the courts where the dispassionate grand jury, the dispassionate judges may hear it.

We say, on the other hand, that every reasonable practicality having to do with men who must be elected to office, to men who must seek campaign contributions, to men who necessarily must confer with, consult with, and be influenced by their constituents, day after day, in order to avoid an inference being drawn in a grand jury by an over-active prosecutor.

Q Is there anything in the framers' consideration of the speech and debate clause that supports that position?

MR. RAMSEY: I believe, sir, that you will find this philosophy, that is to say, the philosophy of the right to a political philosophy is, for example, covered by Mr. Kirby in his study for the bar of the City of New York, as respects the matter.

It's covered by a Harvard Law Review Article, in 17 Harvard Law Review --

Q Perhaps we can get that, whether there were any minutes, any kind of record, of what it was the framers reported as what they had in mind when they adopted the speech and debate clause in its present form.

MR. RAMSEY: I do not believe, sir, that I can honestly represent that there is a specific statement made by one of the framers of the Constitution as respects this, but certainly shortly after it was put into effect as a constitutional provision, it was -- it has been interpreted,

in effect, to retaining this right within the political body, if the Court please.

Q But at least we have a history, I gather, which goes back to 1853, of Congress enacting this form of statute, to relate to the Congress --

MR. RAMSEY: You do have such a history, Mr. Justice Brennan, but I would submit that you also have, co-incident with it, you have running alongside of the 1853 statute, you have repeated assertions by the Congress, or the houses of the Congress, of their right to seek out the alleged bribe-takers, the Oakes Ames type case, all of which are fully discussed in the historical footnotes in our brief.

And in 1873 they are into the Credit Mobilier scandal, in depth, with alleged bribery in the Congress, with the Executive not attempting to use the 1853 statute for any prosecution.

You have the repeated assertion of Congress' right to fulfill its constitutional obligation to discipline its own members, sir.

Now, in connection with the 1853 statute, I believe, six, that this should be kept in mind. Certainly the 1853 statute was designed to cover situations such as the case of U. S. vs. Burton, such as the case of U. S. vs. Johnson, where the whole thrust forward of the case was on the basis that Johnson had been bought. He was bribed. He was a bribed

Congressman. The conspiracy element was admittedly the textural basis for the case, but it was a claimed bribery, and the government advanced many of the same arguments there that are advanced here; and they analogize to and reason from bribery statutes, including the one which is before us now.

Q Well, but as I recall it, Justice Harlan's opinion for the Court did reserve this very question.

MR. RAMSEY: Justice Harlan certainly did, sir, and it's explicit --

Q But that suggests that maybe Johnson didn't answer this question.

MR. RAMSEY: Well, I'm not sure that Justice Harlan, by reserving it, suggested necessarily that this Court would, when it came up, still consider it an adequate case.

Q Except that ordinarily if we reserve a question, I think we try to get over the message that we're not deciding that question.

MR. RAMSEY: Precisely. And if you have not decided it, sir, that I submit you can decide yes or you may decide no, as the case may be.

Q Mr. Ramsey, --

MR. RAMSEY: Yes, sir?

Q -- I don't know whether this analogy would be helpful or not, but let me try it:

Suppose the Senator or a member of either house was

charged, not with receiving a bribe in relation to his official conduct, but with paying a bribe to another member, not in the House but downtown at a hotel or in a restaurant. Would you say that he was immune from prosecution?

MR. RAMSEY: I think, Mr. Chief Justice, that you are addressing yourself precisely to the set of facts that existed in the Oakes Ames case in 1873, when the Congress tried the issue out themselves and the courts did not intercede. That was the distribution of stock in connection with the Credit Mobilier setup, where eight, ten, or twelve -- spread throughout the Congress, as a practical matter, and up and down the line.

I would say this, it seems to me that the House is capable of handling that problem on its own. It seems to us that the Constitution commits that problem to the house of which the man is a member. And it seems to us that the Constitution interdicts the intercession of the Executive. Because the basic situation, as we see it, is this:

To rule or hold otherwise would give such powerful control in the Executive to harass, investigate, and generally badger anybody who makes a politically unpopular decision, unpopular to the Executive -- possibly perfectly acceptable to the Legislative side. And always you have in the political forum, you have the concurrence of the need to get elected, the concurrence of campaign funds, the concurrence of visits

from constituents. The likelihood that the Congressman's votes will indeed represent him as a Silver Bloc Senator, as a Farm Bloc Senator, as a Fishing Bloc Senator, all having received campaign contributions from those particular elements of their constituents.

Once you have an affirmative vote on a contribution, we come then to the question of: May you put that before a grand jury and say, "Now, we're not suggesting it to you but you may certainly draw an inference that there's cause and effect."

The thrust, the overpowering thrust to the freedom of the Congressman, which is posed by that type of a rule would, it seems to us, go a long way to destroy the basic fabric of our tripartite form of government.

Q But you don't suggest that the element of official conduct, or conduct within the scope of his office, is involved when he's a disburser of the money rather than a receiver, do you?

MR. RAMSEY: He would, in that instance, it seems to me, fall within the, as the Solicitor General described it, the briber not the bribee, is the postulate which you're putting to me, Mr. Chief Justice, as I understand it.

And it seems to me that what you certainly have in that case is probably the ability to get him as principal first degree, no matter which side of the coin he's on, if he

occupies his official position.

So I am not sure that which side he's on would make much difference in my professional judgment, as respects his possible freedom from or subjection to discipline or trial, as a result of his conduct, sir.

Now, I would like to address myself, just for a moment, if I may, to one further aspect of this point with respect to the breadth of the privilege.

I think it's perfectly clear, and I think Mr. Justice Brennan's question to the Solicitor General makes it clear, and the concession at page 11 of the government's brief, that what is covered by the speech or debate clause are"committee reports, resolutions, and the act of voting, as are'things generally done in a session of the house by one of its members in relation to the business before it.'"

And I am taking that quote directly out of this Court's opinion in the Powell case. And it of course carries forward a series of other decisions, which had anteceded -- going all the way back to some of the landmark decisions in the early days shortly after the Constitution was adopted; and at a time when it may reasonably be thought that the judges who were writing about it had reason to know basically what was in the mind of the framers.

Insofar as the 1853 Act is concerned, we say this very simply. The 1853 Act could constitute a perfectly proper

exercise of Congressional authority without coming into conflict with speech or debate if it is limited in its impact to situations where a Senator may or did receive moneys in connection with Executive conduct or conduct relating to the Judiciary, but not in connection with Legislative.

And it is there, again coming back, Mr. Chief Justice, to the question which you put to me, sir, it is there that we come back to say that is within the ambit of the house of which he is a member; it is without the ambit of the Judiciary and the Executive.

And looking at the 1853 Act, and looking at the 1962 revision of it, we most respectfully urge that in each of those instances this can be given constitutional validity in its broad range, to protect against bribery; but that the Executive and Judiciary should withhold their hand where they intrude in to what might be called the basic defensive machanism given by the Constitution to the Members of the Congress of the United States.

Q How far would you carry this in terms of other crimes, Mr. Ramsey? You remember, historically, 100 years ago, more or less, some Members of the Congress struck each other and challenged each other to duels, perhaps even shot each other.

MR. RAMSEY: Indeed they did.

Q Was there immunity from prosecution there,

across the board?

MR. RAMSEY: As a practical matter, all of those we recall are in the House and Senate proceedings, and they were quite frequently called to task, particularly at about the time of the Civil War; they were called to task for challenging to duels, for fisticuffs on the floors of the various houses of Congress.

And basically I would say that that is not covered by speech or debate, or by this Court's interpretation of speech or debate.

Now, again, on the other side of that, it is clearly within the House's power to punish unseemly behavior on the floor of its legislative hall.

Q The question is, is it beyond the power of the Executive?

MR. RAMSEY: I would think, sir, it would probably, in most instances, fall outside the scope which I contend for the speech or debate clause, as interpreted by this Court.

Q Would you say, then, Mr. Ramsey, that if there were a statute which punished an assault by one Congressman upon another, and provided that the punishment should be by the Judiciary in the form of a prosecution, you would say that that would be constitutional?

MR. RAMSEY: I would think that it would, sir, because I think it would fall outside the definition of things

ordinarily done in the session of the houses of which they are a member.

In other words, I simply cannot read bodily assault into it.

Now, I would say, contrariwise, Mr. Justice Brennan, that what would occur would be that the house itself would take immediate steps, and there would be little need for the Judiciary or the Executive ever to concern itself with that type situation.

Q Well, let's take a rather outlandish hypothetical. One wanted to vote, a Congressman, a Senator wanted to vote a certain way, and for some reason or other he thought a fellow Senator was impeding his recording of his vote, his announcement of it, and so he just got a gun and shot the Senator standing in his way.

MR. RAMSEY: [Laughing] I have no doubt this Court would, in due course, find that that was a perfectly appropriate case for criminal proceeding.

Q That would not be, even though what was involved was an attempted interference with his vote, you still say that that was not covered by the speech or debate clause?

MR. RAMSEY: I would say that I think that is correct, sir, because I think this is an extreme means used to rectify an error made, which could otherwise be rectified without the

need for physical violence.

And I think as a practical matter, Mr. Justice Brennan, we may be debating something which possibly we don't even have to debate, in that it may well be that because it occurred on federal property you might reasonably be able to apply Title 18 to a murder, for example, which occurred under the circumstances which the Justice has outlined.

A general criminal statute, but this not being within the ambit of speech or debate, hence permissible.

Q I take it, your position is that immunity of Congressmen and Senators is defined by the speech or debate clause, and there is no separate doctrine, aside from that, of legislative immunity?

MR. RAMSEY: I am directing my attention, Justice White, to only speech or debate as interpreted by this Court as sufficient to cover this particular case. I am not arguing a generalized legislative immunity, as such, sir.

Q Do you read Dombrowski v. Eastland as suggesting that there is a doctrine of legislative immunity, aside from the speech or debate clause?

MR. RAMSEY: Well, I suppose Dombrowski v. Eastland can be read for that; it was focused more on the right of the staff members to, shall we say, have the benefit of.

Q Yes, but there was a question of the immunity of a Senator.

MR. RAMSEY: Yes, sir; there was. There very definitely was.

Q But,generally speaking, the doctrine of legislative immunity is one that's applicable to anyone known as a defendant in a civil action, isn't that correct? Any member?

MR. RAMSEY: That was Dombrowski, of course, sir. That was not criminal.

Q It's not generally considered to be a doctrine, then.

MR. RAMSEY: Well, Powell, of course, also was civil as distinct from criminal.

And so in both of those instances you were talking -- I think we invariably find in the opinions, Mr. Justice White, you invariably find discussions which tend to talk in terms of legislative immunity as a shorthand form of referring to what is given, or the protection accorded under a given set of circumstances; and we most frequently see them in the context of libel suits, and we frequently see them in the context --

Q But legislative -- I mean the speech or debate clause would protect a Congressman or Senator against civil liability as well as criminal. As a matter of fact, I suppose protection against libel was a major function of the --

MR. RAMSEY: Indeed, I would expect so, sir.

Q -- speech or debate clause.

MR. RAMSEY: Yes, it may not be questioned in any other place. As they say, it is not a word, really, which is one of the terms of work we are accustomed to. And as the Chief Justice said in a lower court opinion in Powell, in connection with that "may not be questioned" has implicit in it "need not answer". This is -- it's a word that has more meaning, really, than our standard words which go to privilege.

It speaks in terms of, for a speech or debate he may not be questioned in any other place. And the historical antecedents of it very clearly indicate that they were talking about courts in the older days, they were talking about courts in our early charter provisions and in our early State constitutions; that's exactly what they had in mind.

Q Well, let's take the Powell case, which is probably as broad a statement of the speech or debate clause coverage as any.

MR. RAMSEY: Yes, sir.

Q At least it -- and it picked up prior cases, you say?

MR. RAMSEY: That's correct, sir.

Q Now, that clause arose in that case in the context of a claim against a Congressman in the civil context.

MR. RAMSEY: That is correct.

Q And --

MR. RAMSEY: Of course it rules out the exclusion of the Congressman --

Q I understand; I understand.

MR. RAMSEY: -- from the Congress, and the question of the liability of his brothers in the house for their conduct in that connection, sir.

Q You think the speech or debate clause should have the same construction in civil and criminal context?

MR. RAMSEY: I think as a practical matter, Mr. Justice White, it has an even broader application in the criminal context, because of its antecedents; its parliamentary antecedents, with the fears of torture, the fears of commitment to the Tower, the fears of imprisonment, which were used to dominate the Members of Parliament. We brought that forward into our structure, as it came into our Articles of Confederation, and thence into our Constitution, largely to keep the Executive from dominating the Legislative.

Therefore, to me, speech or debate, because of its historical antecedents, has even greater application in the criminal field, because that was one of the major things which the framers were attempting to protect the Legislative against, was intimidation by threat of grand jury, by threat of even a baseless indictment, which can wreck a political being.

Q I take it, just to pursue that one hypothetical,

that you have conceded that if one Member arranged to kidnap or otherwise coerce a Member from going to the Floor to vote, he did this downtown, that that would be subject to ordinary prosecution, criminal prosecution, conduct outside the house, let's say; but that if he hands in an envelope with a lot of money in it to do the same thing, that somehow then becomes connected with official duty.

MR. RAMSEY: I think, Mr. Chief Justice, the point which I make as respects that is this:

The one has to do with conduct, physical conduct, if the Court please; the other has to do with attempting to motivate --

Q Let's just make it a threat, then. A threat of physical violence, not the actual physical violence.

MR. RAMSEY: Well, I'm unclear in the hypothetical which the Court puts to me. Who would be the subject matter of the indictment? The man who made the threat or --

Q The threatenor and the briber, the man who is threatening or giving the bribe, not the receiver.

MR. RAMSEY: Not the receiver.

In that connection, I would take the position that the threatenor should be subject, and I'm sure would be subject, to criminal prosecution. If you were attempting to inquire into why the man who got the bribe voted, motivation being the question you'd be posing in order to prove the bribe,

I would think that you would have an interdiction of the speech or debate clause, as against inquiry into acceptor's motivation, sir.

Now, contrariwise, the man who gives the bribe, you are not inquiring into his motive as respects a vote, you are inquiring into his attempting to motivate another. And somewhere between those two extremes would lie the line of determination, where I believe this Court would say "no" as to the recipient, if you're trying to prove his motive; and "yes" as to the bribe-giver, if you're attempting to prove that he was instituting conduct which would motivate another.

Q Mr. Ramsey.

MR. RAMSEY: Yes, Mr. Justice White.

Q Let's assume an instance like is involved in this case takes place, and the Congress then, by the particular house involved, by resolution unanimously passes and says, "We waive any right to punish the Member, and will let the authorities proceed against him under the criminal laws"?

MR. RAMSEY: I would say, Mr. Justice White, the answer to that has got to be in the basic reason for the clause.

Q Postulate --

MR. RAMSEY: Let's assume that the house may give up its prerogative, so to speak; but I think the Court must look deeper. The prerogative is not there only to protect that house.

Q Just a minute --

MR. RAMSEY: It's put there to protect the persons who elected the members of that house as well as the members.

Q Well, if the house couldn't do that, a fortiori, couldn't do what is done here?

MR. RAMSEY: There is some harping at Judge Hart's colloquy in the government's brief, but Judge Hart put a similar postulate in the colloquy before the court, in the lower court, and I think that this is the reasoning which the lower court was using: if they can't do it, how can they combine with another house, which has no power over their members, and give up this right? Which, frankly, is bottomed on the right of the people's representative to be protected in freedom of speech, freedom of debate, and as that clause has been interpreted by this Court through the years.

Thank you, Mr. Chief Justice, and gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Ramsey.

Mr. Solicitor General, you have about three minutes.

REBUTTAL ARGUMENT OF ERWIN N. GRISWOLD,

ON BEHALF OF THE APPELLANT

MR. GRISWOLD: Thank you, Mr. Chief Justice.

Unless this Court is prepared to hold that Congress has no constitutional power to make it a crime for a Congressman or Senator to accept a bribe for any sort of conduct with respect to his legislative responsibilities, I

believe that this judgment should be reversed.

Q Well, they could make it a crime, Mr. Solicitor General, but provide for the trial of the Member in the House or the Senate.

MR. GRISWOLD: Oh, yes. When I said make it a crime, I meant a crime in the traditional sense, by indictment by grand jury, and prosecution in court.

There isn't any doubt that either house has the power to subject to penalty and to expel a member who does anything which the house thinks warrants that.

There is a further problem, which has been referred to in the cases, which is, as far as the House of Representatives is concerned, imprisonment can extend only until the termination of that Session of the House; and if the bribery was not found until, in the old days, the 2nd of March, you'd have to hold the trial and he'd be released on the 4th of March, whenever the Congress expires.

Moreover, it is perfectly clear that the practical problems with respect to trial of these matters before the House or the Senate are difficult, a fair trial of one of these matters might be complicated, might take the time, for a month, of the Congressmen and Senators. And, I repeat, if Congress chooses to allocate that to the regular courts, unless the court is prepared to hold that Congress cannot constitutionally do that, this judgment should be reversed.

I would repeat --

Q Mr. Solicitor General, the Congress here not only allocated the job, the task of actual trial, but the decision as to whether to proceed --

MR. GRISWOLD: Yes, Mr. Justice, that --

Q -- to the Executive Branch of the government.

MR. GRISWOLD: That is true, and that point is made with respect to the contempt of a witness, that it does require a resolution of the house, on recommendation from the committee, before it goes to the Executive for proper action.

Q But that is not required in this instance?

MR. GRISWOLD: And that is not required in this instance.

Q Well, Mr. Solicitor General, may I ask: I take it that goes this far, that suppose the Senate unanimously has adopted a resolution that "we do not wish to call Senator Brewster into account for this conduct", nevertheless, I gather that the Executive could go ahead with a trial?

MR. GRISWOLD: It would be our position that the Executive could go ahead under this statute. And I repeat, our position is that unless the Court is prepared to hold that Congress has no constitutional power to make it a crime for a Congressman or Senator to accept a bribe for legislative conduct --

Q I don't think he conducted a crime --

MR. GRISWOLD: -- this judgment should be reversed.

Let me refer to the fact that the statute in this case, as it now stands, makes no reference whatever to vote; it simply says "before him in his official capacity." And, though I don't need to go so far, I think that a conviction could be sustained under this indictment without any showing as to how Senator Brewster voted on any matter, or indeed without any evidence that he voted at all.

Finally, I would call attention to the fact that there was a concurring opinion in the Johnson case by Chief Justice Warren in which Justices Brennan and Douglas concurred, which proceeded on the narrow ground of the extensive use of the speech in that case, thus there is nothing there decided beyond that, by anything except a 4 to 3 decision; and our position is that the problem of this case was not only expressly left open, but a considerable intimation that the Court did not think that it should go as far in construing this rather simple language of the speech and debate clause as to make it impossible for Congress, by statute, to make it a crime for a Congressman or Senator to accept a bribe.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, Mr. Ramsey.

The case is submitted.

[Whereupon, at 11:20 a.m., the case was submitted.]